IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1227

WARREN J. MOITY, SR.,
Petitioner,

versus

SWIFT AGRICULTURAL CHEMICAL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ONEBANE, DONOHOE,
BERNARD, TORIAN,
DIAZ, MCNAMARA
& ABELL
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SUBJECT INDEX

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QUESTIONS PRESENTED FOR REVIEW

1. Are there any special considerations which would allow review by the United States Supreme Court?

2. Does the claim of the petitioner, as filed in the United States District Court, Western District, Opelousas Division, present a "substantial" federal claim so as to give the Federal Courts jurisdiction over this matter?

STATEMENT OF THE CASE

A. Course of proceedings and disposition in court below.

Petitioner, WARREN J. MOITY, filed suit against respondent, SWIFT AGRICULTURAL CHEMICALS CORPORATION, in the 27th Judicial District Court of Louisiana, under Civil Docket No. 66536-2, in and for the Parish of St. Landry, Louisiana, for alleged damages resulting from a contract between these parties. The trial court judge granted judgment in favor of petitioner for THREE THOUSAND ONE HUNDRED FORTY-FOUR AND NO/100 ($3,144.00) DOLLARS, but later amended the judgment to grant a portion of the reconventional demand of SWIFT AGRICULTURAL CHEMICALS CORPORATION against MOITY in the amount of SIX HUNDRED TWO AND 22/100 ($602.22) DOLLARS, for debts unrelated to petitioner's claim. Appeals were lodged by both parties in the Third Circuit Court of Appeal, State of Louisiana, at Lake Charles, Louisiana, under Civil Docket Number 5793, appealing this judgment. The Third Circuit Court of Appeal reversed that portion of the judgment of the 27th Judicial District Court which awarded $3144.00 to the petitioner and affirmed the balance of the judgment. *Moity v. Swift*, 342 So.2d 287 (1977). On April 27, 1977, the Louisiana Supreme Court denied petitioners application for writs of certiorari. Petitioner then filed suit in the United States District Court in the Western District of Louisiana, Opelousas Division, bearing No. 770484, alleging that he had been denied due process because Judge Edmond Guidry, Jr., one of the three judges of the Third Circuit Court of

Appeal, had made certain statements during the appellate argument without qualifying and testifying as an expert witness. Judge Nauman Scott, Judge in the Opelousas Division, dismissed the petitioner's complaint because the lack of jurisdiction of the subject matter was apparent on the face of the record. Petitioner appealed this dismissal to the United States Court of Appeals, Fifth Circuit, Docket Number 77-2248. That Court affirmed the judgment of the District Court. Petitioner thereupon made this application for writs of certiorari.

B. Statement of Facts

In the summer of 1973, petitioner, WARREN J. MOITY, called SWIFT AGRICULTURAL's plant at Lewisburg, Louisiana, and booked some rye grass seed for the coming fall. On September 19, 1973, petitioner requested that SWIFT mix the rye grass seed and fertilizer together and deliver it to petitioner for planting, petitioner telling Aubrey Miller, Plant Manager for SWIFT, that he wanted grazing in two (2) weeks, which, according to Miller, was impossible. At that time, a discussion took place between petitioner and Miller wherein Miller advised petitioner that it was too early to plant rye grass seed on an old sod pasture, and tried to discourage him from planting at that time. However, petitioner insisted that he had "bought a bunch of cows" and he had to have grass to put them on to graze.

On the afternoon of the 19th, SWIFT commenced mixing rye grass seed and ammonium nitrate, in the proportions which petitioner and SWIFT had agreed

upon, that is, 400 pounds of ammonium nitrate to 40 pounds of rye grass seed for each acre to be planted, for a total of 120 acres. The mixing of ammonium nitrate and rye grass seed commenced in the afternoon of the 19th, and except for an insignificant amount, all of the fertilizer and seed was spread in petitioner's field by the afternoon of September 21st.

The rye grass planted in the pasture failed to grow, and about a week after the planting, petitioner filed a complaint at SWIFT's plant in Lewisburg and had several further discussions with SWIFT's agent about this problem and subsequently this State Court litigation ensued.

ARGUMENT

Petitioner has not demonstrated or even attempted to demonstrate any special or important considerations for the exercise of this Court's discretion in granting petitioner's writ of certiorari.

The decision of the United States Court of Appeals, Fifth Circuit, is not in conflict with a decision of another court of appeals on the same matter nor is it in conflict with any applicable decisions of this Court. The Fifth Circuit did not decide an important question of state law in a way in conflict with applicable state law. Nor is this an important question of federal law which has not been, but should be, settled by this Court. Finally, the decisions of both the United States District Court and the Court of Appeals, Fifth Circuit, were not a departure from the accepted and usual course of judicial proceedings.

Not only has petitioner failed to show any special considerations for review of this case, but he has also failed to show that the decisions below are anything other than correct decisions of law. The District Court dismissed petitioner's claim for lack of jurisdiction of the subject matter.

Petitioner claims that the jurisdiction of the Federal Courts is invoked pursuant to 28 USC 1343 as well as several articles and amendments of the United States Constitution. Not every case arising under Federal Law is within Federal Question jurisdiction; the federal claim must be a "substantial" one. The requirement of substantiality does not refer to the value of the interests that are at stake, but to whether there is any legal substance to the position the plaintiff is presenting. *Garvin v. Rosenau*, 455 F.2d 233 (6th Cir., 1972). In the recent case of *Hagans v. Lavine*, 415 U.S. 528, 94 S. Ct. 1372 (1974), this Court summarized the jurisprudence on this subject in this way:

> "The principal applied by the Court of Appeals . . . that a 'substantial' question was necessary to support jurisdiction . . . was unexceptionable under prior cases. Over the years the Court has repeatedly held that the Federal Courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, 24 S. Ct. 553, 557, 48 L.Ed. 795, (1904); 'wholly insubstantial.' *Bailey v. Patterson*, 369 U.S. 31, 33, 82 S. Ct. 549, 550-551, 7 L.Ed. 2d 512 (1962):

'obviously frivolous," *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 30 S. Ct. 326, 327, 54 L.Ed. 482 (1910); 'plainly unsubstantial,' *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105, 53 S. Ct. 549, 550, 77 L.Ed. 1062 (1933); or 'no longer open to discussion,' *McGilvra v. Ross*, 215 U.S. 70, 80, 30 S. Ct. 27, 31, 54 L. Ed. 95 (1909). One of the principal decisions on the subject, *Ex parte Poresky*, 290 U.S. 30, 31-32, 54 S. Ct. 3, 4-5, 78 L. Ed. 152 (1933), held, first, that '[I]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented'; second, that a three-judge court was not necessary to pass upon this initial question of your jurisdiction; and third, that '[t]he question, may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' *Levering & Garrigues Co. v. Morrin*, supra.; *Hannis Distilling Company v. Baltimore*, 216 U.S. 285, 288, 30 S. Ct. 326. 54 L. Ed. 482; *McGilvra v. Ross*, 215 U.S. 70, 80, 30 S. Ct. 27. 54 L. Ed. 95."

Thus a Federal Court must dismiss for want of jurisdiction if the federal claim that is the basis for jurisdiction is obviously without merit or is wholly frivolous.

The complaint filed by petitioner in the District Court below alleges that petitioner was denied his constitutional rights because Judge Edmond Guidry, Jr., of the Third Circuit Court of Appeals of Louisiana made a statement during the appeal that was relied on by the Third Circuit in deciding against him. The complaint is "wholly without merit" for the following reasons.

First, even if Judge Guidry made such statement and even if it was improper for him to do so, the statement was not relied on by the Third Circuit Court of Appeal of Louisiana in reversing the decision of the State District Court. The statement attributed to Judge Guidry was allegedly to the effect that this particular year was a bad year for rye grass and that the damage was done by planting on an unplowed ground. As can be seen from the opinion of the Third Circuit Court of Appeal (set out in full beginning on page 57 of petitioner's petition) their decision was based upon the fact that the petitioner decided to plant the rye grass entirely too early in the season, and against all advice of experts that he had consulted. The Court did not rely on a position that that particular year was a bad year for rye grass or that the rye grass did not grow because it was planted on an unplowed ground, and indeed, these issues are not even mentioned in that Court's opinion.

Furthermore, even if the facts were such that the petitioner would have a cause of action for a violation of his civil rights under the color of state law, such action surely could not be against SWIFT AGRICULTURAL CHEMICALS CORPORATION as

SWIFT had no part in the making of the statement by Judge Guidry and in no way violated the petitioner's civil rights. SWIFT AGRICULTURAL CHEMICALS CORPORATION was never acting for the state or connected with the state with regard to this lawsuit and furthermore, there are absolutely no allegations of wrongdoing by SWIFT AGRICULTURAL CHEMICALS CORPORATION whatsoever in the petitioner's complaint. Any possible action the petitioner may have regarding this incident would be against the Louisiana Judicial System or against Judge Guidry himself, but not against SWIFT AGRICULTURAL CHEMICALS CORPORATION.

From all of the above, it is clear that the petitioner's claim against SWIFT AGRICULTURAL CHEMICALS CORPORATION is "obviously without merit and wholly frivolous", and thus there is no "substantial" federal question involved. This can be further seen from the fact that the petitioner, in his complaint and amended complaint in the United States District Court, requests not that he be given a new trial in State Court because his due process rights were violated, but that the Federal District Court hear the case on the merits and award him a judgment similar to that awarded by the State District Court. Thus it appears that after losing his case on the merits in State Court, the petitioner is trying here to set up some basis of federal jurisdiction and then have his case heard by the Federal Court system.

CONCLUSION

Petitioner has failed to set forth any special reasons why this Court should review this matter. Furthermore, the judgments of the courts below were correct in dismissing petitioner's complaint for lack of jurisdiction, as petitioner's complaint in the District Court failed to state a substantial federal question because his claim was obviously without merit and wholly frivolous, as the statement attributed to Judge Guidry was not relied on by the Third Circuit Court of Appeal of Louisiana and even if such statement did violate Appellant's civil rights, his action is obviously against Judge Guidry or the Louisiana Court system.

For the above and foregoing reasons, SWIFT AGRICULTURAL CHEMICALS CORPORATION prays that the petitioner's application for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that three (3) copies of the above and foregoing have this day been forwarded to petitioner, WARREN J. MOITY, by depositing same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this ____ day of April, 1978.

JAMES E. DIAZ